

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

WARING PARK,

Plaintiff,

v.

UNITED STATES,

Defendant.

3:14-cv-00554-MMD-WGC

**REPORT & RECOMMENDATION OF  
U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Before the court is Plaintiff's Application to Proceed In Forma Pauperis (IFP) (Doc. # 1)<sup>1</sup> and pro se Complaint (Doc. # 1-1).

**I. APPLICATION TO PROCEED IFP**

A person may be granted permission to proceed IFP if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915; *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that this provision applies to all actions filed in forma pauperis, not just prisoner actions).

In addition, the Local Rules of Practice for the District of Nevada provide: "Any person, who is unable to prepay the fees in a civil case, may apply to the Court for authority to proceed *in forma pauperis*. The application shall be made on the form provided by the Court and shall include a financial affidavit disclosing the applicant's income, assets, expenses, and liabilities."

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<sup>1</sup> Refers to court's docket number.

1 LSR 1-1.

2 "[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some  
3 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)  
4 (quoting *Jefferson v. United States*, 277 F.2d 823, 725 (9th Cir. 1960)). A litigant need not "be  
5 absolutely destitute to enjoy the benefits of the statute." *Adkins v. E.I. Du Pont De Nemours &*  
6 *Co.*, 335 U.S. 331, 339 (1948).

7 From his application, it appears Plaintiff cannot pay the filing fee. Therefore, the court  
8 recommends that his application to proceed IFP be granted.

## 9 **II. SCREENING**

### 10 **A. Standard**

11 28 U.S.C. § 1915 provides: "the court shall dismiss the case at any time if the court  
12 determines that...the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim upon  
13 which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune  
14 from such relief. 28 U.S.C. § 1915(e)(2)(B)(i)-(iii). This provision applies to all actions filed  
15 IFP, whether or not the plaintiff is incarcerated. *See Lopez v. Smith*, 203 F.3d 1122, 1129 (9th  
16 Cir. 2000) (en banc); *see also Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001) (per curiam).

17 Dismissal of a complaint for failure to state a claim upon which relief may be granted is  
18 provided for in Federal Rule of Civil Procedure 12(b)(6), and this court applies the same  
19 standard under Section 1915(e)(2)(B) when reviewing the adequacy of the complaint or amended  
20 complaint. *See Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000) (citation omitted). Review  
21 under 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*,  
22 232 F.3d 719, 723 (9th Cir. 2000).

23 In reviewing the complaint under this standard, the court must accept as true the  
24 allegations of the complaint, *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 740 (1976),  
25 construe the pleadings in the light most favorable to plaintiff, and resolve all doubts in the  
26 plaintiff's favor, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Allegations in pro se  
27 complaints are held to less stringent standards than formal pleadings drafted by lawyers, and  
28 must be liberally construed. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404

1 U.S. 519, 520-21 (1972) (*per curiam*); *Hamilton v. Brown*, 630 F.3d 889, 893 (9th Cir. 2011).

2 A complaint must contain more than a "formulaic recitation of the elements of a cause of  
3 action," it must contain factual allegations sufficient to "raise a right to relief above the  
4 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading  
5 must contain something more...than...a statement of facts that merely creates a suspicion [of] a  
6 legally cognizable right of action." *Id.* (quoting 5 C. Wright & A. Miller, Federal Practice and  
7 Procedure § 1216, at 235-36 (3d ed. 2004)). At a minimum, a plaintiff should state "enough  
8 facts to state a claim to relief that is plausible on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*,  
9 556 U.S. 662, 678 (2009).

10 A dismissal should not be without leave to amend unless it is clear from the face of the  
11 complaint that the action is frivolous and could not be amended to state a federal claim, or the  
12 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d  
13 1103, 1106 (9th Cir. 1995) (dismissed as frivolous); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th  
14 Cir. 1990).

## 15 **B. Plaintiff's Complaint**

16 The gravamen of Plaintiff's Complaint is that he submitted an application to the Social  
17 Security Administration (SSA), and they have advised him a decision has been made but will not  
18 advise him as to its disposition. (Doc. # 1-1 at 2.) He contends that this conduct violates his  
19 rights under the Fifth Amendment (due process), Fourth Amendment (taking of property in the  
20 form of benefits), and the Eighth Amendment (cruel and unusual punishment due to denial of  
21 Medicare benefits). (Doc. # 1-1 at 2.)

22 The court finds Plaintiff does not state a claim upon which relief may be granted. First,  
23 there is no plausible claim that Plaintiff's due process rights have been violated because it is not  
24 apparent that he in fact has a property interest in the form of disability benefits because he  
25 alleges that the SSA is determining whether or not he is entitled to such benefits and has not  
26 provided him with this disposition. For the same reason, he cannot plausibly assert a claim that  
27 his Fourth Amendment rights have been violated by virtue of the fact that he has not been  
28 granted benefits. The Eighth Amendment claim likewise fails because there is no recognized

1 claim based on the denial of Medicare benefits to which Plaintiff may or may not be entitled  
2 under the Eighth Amendment.

3 To the extent Plaintiff is seeking judicial review because he his application for benefits  
4 has been denied by virtue of the alleged failure of the SSA to provide him with a disposition,  
5 Section 42 U.S.C. § 405(g), only provides for judicial review of a "final decision of the  
6 Commissioner of Social Security[.]" A claimant's failure to exhaust administrative remedies  
7 under section 405(g) deprives a district court of jurisdiction. *See Bass v. Soc. Sec. Admin.*, 872  
8 F.2d 832, 833 (9th Cir. 1989). Here, Plaintiff alleges he has not been given the disposition of his  
9 application for benefits to the SSA; therefore, it is implied that he has not exhausted his  
10 administrative remedies which would give this court jurisdiction for judicial review of a final  
11 decision of the Commissioner.

12 Finally, the court notes that Plaintiff has only sued the United States. "[T]he United  
13 States, as sovereign, is immune from suit save as it [expressly and affirmatively] consents to be  
14 sued." *Tobar v. United States*, 639 F.3d 1191, 1195 (9th Cir. 2011) (citation and quotation marks  
15 omitted). Absent a waiver of sovereign immunity, a court lacks jurisdiction over a suit against  
16 the United States or one of its agencies. *Dunn & Black P.S. v. United States*, 492 F.3d 1084,  
17 1087 (9th Cir. 2007). The party asserting a claim against the United States bears "the burden of  
18 establishing [the government's] unequivocally expressed waiver." *Id.* at 1088.

19 As a result, the court recommends that Plaintiff's action be dismissed. The dismissal  
20 should be with prejudice as it does not appear the defects noted can be cured by amendment;  
21 however, once he has a final decision from the Commissioner on his application for benefits,  
22 Plaintiff may file a new action for review of the decision after he has exhausted his  
23 administrative remedies. His constitutional claims related to the alleged failure to provide him  
24 with the disposition of his application, however, should be dismissed with prejudice.

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**III. RECOMMENDATION**

IT IS HEREBY RECOMMENDED that the District Judge enter an order:

- (1) **GRANTING** Plaintiff's IFP application (Doc. # 1) and directing the Clerk to **FILE** the Complaint (Doc. # 1-1); and
- (2) **DISMISSING** the Complaint (Doc. # 1-1) **WITH PREJUDICE**; except, that Plaintiff may file an action for review of the Commissioner's final decision on his application for benefits to the SSA after he receives a decision and has exhausted his administrative remedies.

Plaintiff should be aware of the following:

1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule IB 3-2 of the Local Rules of Practice, specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be titled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of the District Court's judgment.

DATED: April 13, 2015.

  
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WILLIAM G. COBB  
UNITED STATES MAGISTRATE JUDGE